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No. 88-1227 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STEPHEN J. RUSSO,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF SANTA CLARA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

PETITIONER'S REPLY MEMORANDUM

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I. PETITIONER NEVER WITHDREW HIS PETITION FOR REVIEW FROM THE CALIFORNIA SUPREME COURT.

In their brief in opposition to this petition for writ of certiorari, plaintiffs assert that petitioner Russo withdrew his petition for review from the California Supreme Court as a result of stipulations entered on the first day of trial, October 3, 1988. This is not true, and in fact the petition for review was denied by the California Supreme Court on October 27, 1988. A facsimile of the California Court's order denying review is reproduced at page a22 of the appendix to this petition.

The transcript reproduced in the appendix to plaintiffs' opposition brief demonstrates the confusion underlying their erroneous assertion that the California petition for review was withdrawn:

> The Court: Now, this personal waiver of appeal, Mr. Russo, do you waive any rights of appeal that you have from this case? Mr. Harrison and Mr. Russo, I think you can do it, Mr. Harrison?

> Mr. Harrison: We have done so. I thought that was part of the stipulation. And actually included within that, as the court knows, is a, there was a pending petition on denial of a writ on the 877.6 good faith hearing from May of '88.
>
> The Court: Yes.
>
> Mr. Harrison: That was denied but I did file a petition for review with the Supreme Court which is pending. It has not been denied. So that I have to assume as part and parcel of that is a withdrawal?
>
> The Court: Well, that is not a right of appeal from a judgment, actually that's a writ proceeding. But I take it that that writ proceeding, whatever it is, and I am not familiar with it, but is that withdrawn?
>
> Mr. Harrison: Let me talk to my appellate lawyer here. It may have been denied. So, there was a petition for a stay that got denied. So may be moot. It is not an important issue, I don't believe. I am not going to—
>
> The Court: Well, the point is—all right.
>
> Mr. Harrison: A moot thing, red herring.

Counsel for petitioner Russo did not intend to withdraw the petition for review as a result of this colloquy. The California Supreme Court denied the petition for review twenty-four days later. Petitioner therefore complied with the jurisdictional prerequisite of 28 U.S.C. Section 1257, which requires a final judgment or decree by the highest state court respecting the question presented to this Supreme Court.

II. PETITIONER RUSSO HAD NO NOTICE OF THE INITIAL GOOD FAITH SETTLEMENT DETERMINATIONS MADE BEFORE HE WAS SERVED AS A DEFENDANT IN THIS LITIGATION.

Plaintiffs misrepresent the actions of counsel for petitioner Russo during the trial of seven test cases in this litigation prior to service on petitioner. Counsel for Mr. Russo attended the trial as a spectator on two occasions only, and was never included on any service or notice list until after his client was brought into 477 of these cases by service of summons and complaint on June 10,

1988. Neither Mr. Russo nor his attorney received notice of the good faith settlement motions heard on May 18 and 25, 1988.

III. AT EVERY STAGE OF THE PROCEEDINGS LEADING UP TO THIS PETITION FOR CERTIORARI, PETITIONER ASSERTED THE SETTLEMENTS WERE NOT MADE IN GOOD FAITH.

Plaintiffs erroneously argue that petitioner failed to assert lack of good faith in the California courts below. In fact, petitioner raised that issue at every stage of the proceedings. For example, in his petition for review by the California Supreme Court petitioner stated, "The settlements were not made in good faith and must not preclude cross-complaints to be filed by this defendant . . .." Petition for Review at 6:17. Similarly, in the petition for writ of mandate filed in the California Court of Appeal, petitioner said, "The settlements were not made in good faith and must not preclude cross-complaints to be filed by this defendant." Petition for Writ of Mandate at 5:26. In respondent superior court, petitioner's brief in opposition to the good faith settlement motions addressed the criteria for good faith settlement defined in *Tech-Bilt, Inc.* v. *Woodward-Clyde & Associates*, 38 Cal.3d 488, 698 P.2d 159, 213 Cal.Rptr. 256 (1985), including proportionality, and concluded:

> The modest settlements proposed by the settling defendants at this early stage serve only to finance the balance of this entire litigation to the detriment of this defendant and will tend to add to the congestion of the Court's calendar. Although some of the settlement figures released by certain defendants may appear substantial, when considered along with recent verdicts rendered in related cases after trial, the proposed settlement amounts pale by comparison.

Opposition to Motion for Judicial Determination of Good Faith Settlement at 7-8. Clearly, petitioner raised this issue at every stage of the proceedings.

IV. CONCLUSION.

The severity of the constitutional deprivation effected by respondent superior court cannot be denied. Plaintiffs have failed to refute the underlying lack of good faith which taints respondent superior court's orders.

Petitioner focused on settling defendant KMG Main Hurdman as one example. This large, financially healthy institutional defendant was granted good faith settlement approval after paying only a small proportion of the overall recovery sought by plaintiffs, in spite of having been publicly censured for its wrongful conduct toward plaintiffs. As a result of respondent court's approval of the settlements of institutional defendants such as KMG, individuals such as petitioner Russo are unfairly left to bear the consequences of this litigation.

The need for plenary review of the action below is indisputable. Petitioner requests that this petition for certiorari be granted in order to prevent permanent deprivation of petitioner's constitutionally protected property rights; indeed, summary remand appears to be in order.

Respectfully submitted,

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I am a citizen of the United States and a resident of San Francisco County. I am over the age of eighteen years and not a party to the within entitled action; my business address is: One Daniel Burnham Court, Suite 220C, San Francisco, California 94109. On March 8, 1989 I served the PETITIONER'S REPLY MEMORANDUMON ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT in said action by having true copies thereof placed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at Washington, D.C. addressed to all such parties as follows:

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All parties required to be served have been served.

I declare under penalty of perjury under the laws of the State of California and of the United States of America that the foregoing is true and correct.

Executed on Wednesday, March 8, 1989 at San Francisco, California.

Tamsen E. Perks

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Tamsen E. Perks